Supreme Court, U.S.
FILED
AUG 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-2024 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSE GERARDO MUNOZ-FABELA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

VICKI S. MARANI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether possession of cocaine with intent to distribute is a "drug trafficking crime" within the meaning of 18 U.S.C. 924(c)(1) and (2) (Supp. IV 1986).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

United States v. *Batchelder*, 442 U.S. 114 (1979)	6
United States v. *Contreras*, 895 F.2d 1241 (9th Cir. 1990)	4, 5, 6
United States v. *Culbert*, 435 U.S. 371 (1978)	6
United States v. *Henry*, 878 F.2d 937 (6th Cir. 1989)	6
United States v. *James*, 834 F.2d 92 (4th Cir. 1987)	5, 6
United States v. *Matra*, 841 F.2d 837 (8th Cir. 1988)	6
United States v. *McKinnell*, 388 F.2d 669 (10th Cir. 1989)	6
United States v. *Munoz-Fabella*, 861 F.2d 1278 (5th Cir. 1988)	2
United States v. *Nash*, 876 F.2d 1359 (7th Cir. 1989), cert. denied, 110 S. Ct. 1145 (1990)	5, 6
United States v. *Rivera*, 889 F.2d 1029 (11th Cir. 1989), cert. denied, 110 S. Ct. 2191 (1990)	6
United States v. *Robinson*, 857 F.2d 1006 (5th Cir. 1988)	3, 6
United States v. *Torres*, 862 F.2d 1025 (3d Cir. 1988)	5
United States v. *Whyte*, 892 F.2d 1170 (3d Cir. 1989), cert. denied, 110 S. Ct. 1793 (1990)	6

Statutes:

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4360	4

Statutes—Continued: Page

Controlled Substances Act, 21 U.S.C. 801 *et seq*..... 4
21 U.S.C. 841(a)(1) 2
21 U.S.C. 845(a) 2
21 U.S.C. 846 2
18 U.S.C. 4 2
18 U.S.C. 924(c) (Supp. IV 1986) 6
18 U.S.C. 924(c) 4
18 U.S.C. 924(c)(1) 2, 4
18 U.S.C. 924(c)(1) (Supp. IV 1986) 3, 4
18 U.S.C. 924(c)(2) 4, 5
18 U.S.C. 924(c)(2) (Supp. IV 1986) 3, 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2024

JOSE GERARDO MUNOZ-FABELA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 896 F.2d 908.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1990. On June 5, 1990, Justice White extended the time for filing a petition for a writ of certiorari to June 19, 1990, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to a mandatory five-year term of imprisonment, to run consecutively to a three-year term of imprisonment that had been imposed for his previous conviction of misprision of felony, in violation of 18 U.S.C. 4.[1]

1. The evidence at trial showed that on June 2, 1987, petitioner provided protective surveillance for drug dealers conducting a cocaine transaction. A drug courier named Cardenas told Agent Saldana of the Drug Enforcement Administration, who was working undercover, that he had to retrieve a cocaine shipment from his supplier's house in order to con-

---

[1] Petitioner had pleaded guilty to misprision of felony in satisfaction of another indictment, which charged him with various drug trafficking offenses arising from the same facts and circumstances as the instant crime. Those offenses were: conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 845(a). At the time of his guilty plea, his indictment on the instant charge was pending. The plea agreement was silent as to the disposition of this indictment. Pet. App. 3a; Gov't C.A. Br. 2-4.

Petitioner subsequently moved to dismiss this indictment on double jeopardy grounds. The district court denied the motion, and petitioner took an interlocutory appeal to the court of appeals, which affirmed the denial of the motion in an unpublished opinion. See Pet. App. 8a-9a (*United States* v. *Munoz-Fabela*, 861 F.2d 1278 (5th Cir. 1988) (Table)). Petitioner was then tried, convicted, and sentenced on the instant charge.

summate a drug transaction with the agent. Cardenas left the agent and drove to a house where he parked his van behind a pick-up truck. Less than two minutes later, Cardenas left the house with petitioner. Cardenas drove his van to the parking lot where he had left Agent Saldana, and petitioner followed in the truck. Petitioner positioned and repositioned his truck in so as to give him an unobstructed view of the drug transaction. Petitioner focused his attention on Cardenas and Agent Saldana as Cardenas gave the agent just over a kilogram of cocaine and told him that his source had 25 more kilograms available. Agents then arrested Cardenas and petitioner and seized a loaded 9 mm. pistol from the floorboard of petitioner's truck. Pet. App. 2a-3a, 7a; Gov't C.A. Br. 4-6.

2. The court of appeals affirmed. Relying on its earlier decision in *United States* v. *Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988), the court held that possession of cocaine with intent to distribute is a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1) and (2) (Supp. IV 1986). Pet. App. 7a.

ARGUMENT

Petitioner contends (Pet. 4-7) that cocaine is not a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1) and (2) (Supp. IV 1986). This claim is without merit.

Section 924(c)(1) imposes a mandatory five-year term on anyone who "during and in relation to any * * * drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm." When petitioner committed the instant crime on June 2, 1987, Section 924(c)(2) defined "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." Congress in 1988 amended Section 924(c)(2) to define "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4360. Congress labeled the change a "clarification,"[2] thereby indicating that it had always considered possession with intent to distribute (a felony punishable under the Controlled Substances Act, 21 U.S.C. 801 *et seq.*) to be a drug trafficking crime within the meaning of Section 924(c). See *United States* v. *Contreras*, 895 F.2d 1241, 1244 (9th Cir. 1990).

Petitioner's characterization of the 1986 definition of "drug trafficking crime" as "restrictive" (see Pet.

---

[2] The title of Section 6212 of the Anti-Drug Abuse Act is "Clarification of Definition of Drug Trafficking Crimes in Which Use or Carrying of Firearms and Armor Piercing Ammunition Is Prohibited."

I) is belied by the plain language of that definition, which includes "*any* felony violation of Federal law *involving* the distribution * * * of any controlled substance" (emphasis added). See *United States* v. *Nash*, 876 F.2d 1359, 1362 (7th Cir. 1989), cert. denied, 110 S. Ct. 1145 (1990) (describing possession with intent to distribute as "a necessary step in the distribution process"); *United States* v. *Torres*, 862 F.2d 1025, 1030 (3d Cir. 1988) (describing the definition as "expansive," and noting that it "extends broadly"); *United States* v. *James*, 834 F.2d 92, 93 (4th Cir. 1987) (describing possession with intent to distribute as "closely and necessarily involved with distribution" and noting that the line between possession and distribution may depend on the formality of whether police intervene before or after narcotics change hands). As the Ninth Circuit has observed, "just because possession with intent to distribute is a separate crime from distribution does not mean that it is not a crime 'involving' distribution. Under this reasoning, distribution alone would qualify as a crime 'involving' distribution." *United States* v. *Contreras*, 895 F.2d at 1244; see also *United States* v. *James*, 834 F.2d at 93. Such a limitation would contravene not only the text of Section 924(c)(2), but also one of the statute's original purposes, namely, "to discourage and punish the deadly violence" that "can readily occur when drug traffickers attempt to protect valuable narcotics supplies still in their possession or attempt to stop law enforcement officials from disrupting intended transactions." *United States* v. *James*, 834 F.2d at 93.

Consistently with the plain language of the statute, the courts of appeals have uniformly held that the 1986 definition of "drug trafficking crime" applies to the crime of possession with intent to distribute.

See *United States* v. *Contreras*, *supra*; *United States* v. *Whyte*, 892 F.2d 1170, 1176 (3d Cir. 1989), cert. denied, 110 S. Ct. 1793 (1990); *United States* v. *Rivera*, 889 F.2d 1029, 1030-1031 (11th Cir. 1989), cert. denied, 110 S. Ct. 2191 (1990); *United States* v. *McKinnell*, 888 F.2d 669, 673-674 (10th Cir. 1989); *United States* v. *Henry*, 878 F.2d 937, 943 (6th Cir. 1989); *United States* v. *Nash*, *supra*; *United States* v. *Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988); *United States* v. *Matra*, 841 F.2d 837, 843-844 (8th Cir. 1988); *United States* v. *James*, *supra*. As these courts have recognized, there is no ambiguity in the 1986 version of Section 924(c). While the statute did not expressly include the offense of possession with intent to distribute, the language of the statute was plainly broad enough to encompass that offense. As this Court has stated, "[w]here, as here, 'Congress has conveyed its purpose clearly, . . . we decline to manufacture ambiguity where none exists.'" *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979) (quoting *United States* v. *Culbert*, 435 U.S. 371, 379 (1978)).

Besides being rejected by every court that has addressed it, petitioner's contention is of no continuing importance in view of the 1988 amendment of Section 924(c)(2) that makes "any" felony punishable under the Controlled Substances Act a "drug trafficking crime." Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

VICKI S. MARANI
Attorney

AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20078